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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 281.

ALICE WOLFE, Administratrix of the Estate of Owen Wolfe, Deceased,
Petitioner,

vs.

BERRYMAN HENWOOD, Trustee, St. Louis Southwestern Railway Company.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JOE C. BARRETT,
Counsel for Respondent.

ARCHER WHEATLEY,
BERL S. SMITH,
Of Counsel.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Respondent respectfully shows to this Honorable Court:

A.

STATEMENT.

Owen Wolfe was a section laborer who performed the usual and ordinary tasks of that employment (R. 43, 44, 45 and 49). The section was six miles in length, two miles of which is within the city limits of Jonesboro. The additional switch and yard tracks in the city resulted in most of the track mileage of the section being in the yards.

On the day of his injury, Wolfe, with other section laborers, worked for two or three hours dipping an accumulation of fuel oil and water from a catch basin constructed to receive leakage from the fuel line running from the storage tanks to the fuel spout used to service oil-burning locomotives. The catch basin was from three to four feet deep and of similar dimension horizontally. Water Service men were present to repack the leaky joints, and the section laborers were assigned to remove the accumulated waste in the catch basin. They did this with buckets. None of the laborers got into the pits. When they dipped the oil and water from the catch basin, they carried it to a convenient dumping place. Two of the laborers went home and got their boots before beginning this work—Wolfe did not.

In doing this work Wolfe and his co-laborers got oil on their gloves and on their pants legs; some more than others, depending on the care with which they carried the buckets of oil. This oil was not highly combustible. The flash point was from 310 to 335 degrees Fahrenheit (R. 82). The handling of that product is not dangerous (R. 101).

Upon completion of this task, Wolfe and the other section laborers were released to return for work with the section crew. They went to a toolhouse some two hundred feet from the depot and some three hundred to five hundred feet from the roundhouse, in both of which washrooms were located. At that time Wolfe was safe and uninjured.

At the toolhouse, Wolfe, of his own volition and without any direction, command, assent or acquiescence of his employer or any superior officer or agent, obtained cotton waste and gasoline. He saturated the waste with gasoline

and used it to clean his clothes and the legs of his overalls. He was safe and uninjured when he had completed the cleaning operation. The occurrence may well be stated in Wolfe's own language, as follows:

> "After we had got out all the oil we then went on up to the toolhouse and I got a piece of waste, and poured gasoline on it, then cleaned my gloves first and then cleaned the oil off the pant legs. After I finished I then threw the waste out near the track. Then I decided I had better burn the waste, as someone might come there and set the waste on fire, and this would burn the toolhouse up. So then I walked out there and took off the glove off my right hand, and left the left glove on. These were cloth gloves, leather palm and cloth back. After this I then took a small box of matches out of my pocket, bent over and then struck the match on the box, holding the box with my left hand. I lit the match and threw it out on the waste and it caught, but at the same time, the flames on the match caught my glove and set it on fire. Then I slapped the side of my right leg to put the fire out on the glove, and then this set fire to my pant legs, and the flames shot up towards my head. By this time the two boys, Sullivan and Jones, grabbed me, and began to tear off my clothes, as I was on fire" (R. 8-9).

Wolfe died as a result of the burns.

At the trial the court reserved ruling on Respondent's motion for instructed verdict and submitted the case to the jury under instructions, which Respondent says were erroneous. After entry of judgment in favor of Petitioner on the jury's verdict, a timely motion for judgment notwithstanding the verdict was filed, granted and judgment entered for Respondent (R. 134).

B.

1. The United States Circuit Court of Appeals, Eighth Circuit, did not err in affirming the decision of the Trial Court.

2. The decision of the Circuit Court of Appeals is not in conflict with other decisions of this Court.

Wherefore, Respondent respectfully prays that Petition for Writ of Certiorari be denied.

BERRYMAN HENWOOD,
Trustee, St. Louis Southwestern
Railway Company,

By JOE C. BARRETT,
Counsel for Respondent.

ARCHER WHEATLEY,
BERL S. SMITH,
Jonesboro, Arkansas,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

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RESPONDENT'S BRIEF.

I.

STATEMENT OF FACTS.

The statement of facts as set forth in the opinion of the Circuit Court of Appeals (R. 140-147) is a fair, accurate and full statement, the evidence being undisputed.

II.

There was no error by the Circuit Court of Appeals.

III.

ARGUMENT.

Petitioner's brief (page 9) entirely overlooks the fact that Respondent, in the Trial Court, moved for a directed verdict at the close of all the evidence, a ruling on which motion was reserved. It must be borne in mind that specific objections quoted in the brief were dictated after the Trial Court had indicated its intention to submit the case to the jury and had reference to the language of the Court's charge to the jury.

Counsel for Petitioner do not distinguish between the principles of law applicable to suits based upon the Boiler Inspection Act and the Safety Appliance Act and suits based upon the common law rule of negligence involving accidents of this kind where neither the Boiler Inspection Act, nor the Safety Appliance Act is applicable. Meyers v. Reading Company, decided June 2, 1947, L. Ed. Adv. Sheet 91, p. 1199.

First, let us review briefly the history of the Federal Employers' Liability Act. By its passage Congress modified the common law by: (1) abolishing the fellow servant rule, (2) substituting comparative negligence for the strict rule of contributory negligence, and (3) by allowing survivors' actions for tort liability. The Act as originally passed in 1906, and repassed with alteration not material to the discussion here in 1908, still left the assumption of risk as a defense. The 1939 Amendment did nothing more than abolish assumption of risk. This was the essence of the opinion of the first Tiller case, 318 U. S. 54, 87 L. Ed. 610. It is made quite clear in the opinion that actions bottomed upon this Act still require negligence of railroad to be the proximate cause of an injury. Justice Black

in the opinion in the first Tiller case has this to say at page 617 in the L. Ed. report:

> "A fair generalization of the rule is given in the Senate Committee report on the 1939 amendment: 'In justice, the master ought to be held liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances.' "

This is just another way of saying that the duty on the master is to exercise reasonable care.

The next case reaching the Supreme Court of the United States after the adoption of the 1939 Amendment was Bailey v. Central Vermont Railway, 319 U. S. 350, 87 L. Ed. 1444. Justice Douglas wrote the opinion in the Bailey Case, and after discussing the evidence has this to say:

> "There was in our view sufficient evidence to go to the jury on the question whether, as alleged in the complaint, respondent was negligent in failing to use reasonable care in furnishing Bailey with a safe place to do the work. * * * in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery."

This is just another way of saying that what is reasonable care depends upon the circumstances, but the test is still recognized as being what a reasonably prudent person would have done under the same, or similar circumstances. It did not, therefore, change the common law on the question of negligence.

Another late case is that of Tennant v. Peoria & Pekin Union Railway Company, 321 U. S. 29, 88 L. Ed. 520. Justice Murphy wrote the opinion in this case, and among other things said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident."

Then the second Tiller case reached the Supreme Court, 323 U. S. 574, 89 L. Ed. 465. Justice Black wrote the opinion in this case and it was again recognized that negligence of the defendant had to be proximate cause of the injury, even though, at that time, by an amendment to the pleading after reversal, it was alleged that the Atlantic Coast Line was guilty of violation of the **Boiler Inspection Act.** The essence of the opinion was merely that from the evidence "it was for the jury to determine whether the failure to provide the required light on the rear of the locomotive **proximately** contributed to the deceased's death."

Following this was the decision in Blair v. B. & O., 323 U. S. 600, 89 L. Ed. 490. Here, again, the opinion was written by Justice Black and the same principle was again expressed in the language, "We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances." This statement was a recognition of the common law definition of negligence and that such negligence had to be the proximate cause of the injury.

The most recent case of Lavender v. Kurn, decided March 25, 1946, appearing in the 90 L. Ed. Advance Sheet No. 11 at page 692, does not add anything to the principle involved. In the Lavender case there was no positive evidence of how the deceased received the injury resulting in his death. A switch tender was found dead. Circumstances were in proof from which a jury might infer that he was injured by a hook on the side of a mail car. There was also proof from which a jury might have inferred

that he was murdered. All the opinion actually does, therefore, is to say that, under this kind of disputed proof, it was proper for the jury to infer which was the cause of death.

From the foregoing cases it is clear that this Court still adheres to the doctrine that before a plaintiff can recover in suits brought under the Federal Employers' Liability Act, he must sustain the burden of proving: (1) that the railway was negligent, and (2) that this negligence was the proximate cause of the injury. If there was any doubt about this statement, that doubt was resolved in the case of Brady v. Southern Railway, 320 U. S. 476, 88 L. Ed. 239. In this case there was some slight conflict in proof. In discussing this feature the court said: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case, the jury." Further on in the opinion the court adopts the language of the Kellogg case as follows:

> "But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

The court further said: "Events too remote to require reasonable provision need not be anticipated." The opinion in the Brady case is further significant as indicating the court's interpretation of the Tiller case. For instance, it cites the Tiller case in support of the following: "Liability arises from negligence, not from injury, under this Act. And that negligence must be the cause of the injury." It will be remembered that the Brady case was tried in the State Court of North Carolina, resulting in judgment for

Brady. The Supreme Court of North Carolina reversed the trial court for error in refusing to direct a verdict. On certiorari the Supreme Court of the United States affirmed the decision of the Supreme Court of North Carolina.

While interpretation of the Employers' Liability Act is a Federal question to be determined by the Federal Courts, the question of negligence is one of common law. What is negligence, and whether the chain of causation is broken is not a Federal question. Swift v. Tyson, 16 Peters 1, 10 L. Ed. 865, decided in 1842, was the beginning of a long line of decisions holding that there was a body of federal common law which should be applied for the sake of uniformity. In 1938, and without the question having been presented in briefs, or argued by counsel, the Supreme Court overruled Swift v. Tyson in Erie Railroad v. Thompkins, 304 U. S. 64, 82 L. Ed. 1188. In this opinion the court makes the flat statement: "There is no federal general common law." From that time to now the Federal Courts have been required to apply common law of the forum. The Erie Railroad case has never been overruled, although some of the language of the recent opinions under the Federal Employers' Liability Act might at first glance appear to impair the holding in the Erie case. A careful reading of those opinions, however, will demonstrate that wherever the court was talking about the federal question, they were not talking about a principle of common law. They were talking either about an interpretation of the Act, such as the effect of the 1939 Amendment, or they were discussing whether conflicting evidence presented a jury question under the Act.

Counsel for Petitioner, in their brief, at page 14, cite Griswold v. Gardner, 155 Fed. 2d 333, in which certiorari was denied, 91 L. Ed. 41. They quote from the opinion of Judge Major. It is significant that of the three judges sitting in this case, two of them disagree with the language

used by Judge Major, although one of the three concurred in the result while the other filed a dissenting opinion, the significant portion of which recognizes the principle that under the rule of Erie v. Thompkins the question of what is negligence, proximate cause, and efficient intervening cause are not Federal questions but are determined by the laws of State. (See dissenting opinion, page 338.)

It makes little difference whether the rule negligence in Arkansas or the rule of negligence applied in the Federal Courts be considered the test, because it is essentially the same. In the very recent case of Hayes v. Missouri Pacific, 208 Ark. 370, 186 S. W. (2d) 780, our court states the rule to be: "It is a fundamental rule of law that, to recover damages on account of the unconditional negligence of another, it must appear that the injury was the natural and probable consequence thereof, and that it ought to have been foreseen in the light of attending circumstances." As we shall show later, this is the test universally applied in the Federal Courts. We would call the court's attention, also, to the fact that in the Hayes case the court held that the chain of causation between the defendant's negligence and the appellant's injury is broken when an independent act of the plaintiff not within reasonable contemplation of the defendant intervenes to bring about the injury.

Furthermore, the very recent case of Missouri Pacific v. Davis, 208 Ark. 86, 186 S. W. (2d) 20, is an authoritative discussion of the recent opinions in cases brought under the Employers' Liability Act. The opinion in this case was written by Justice McFadden. Just as in the present case, counsel for plaintiff there argued that the rationale of the recent cases, such as Tiller, Brady, etc., is that when the injury is shown, and the manner in which it occurred is detailed, then the jury may decide the negligence and the

reviewing authority must not disturb the verdict. Justice McFadden, speaking for the Supreme Court of Arkansas, says: "We hold that these cases do not go to any such length." We cite this case to show the views of the learned Judge, speaking for a unanimous court and made after review of all of the recent cases, decided prior to January 29, 1945.

To show that the common law rule of negligence applicable here is nothing new, we review a large number of cases, beginning in 1917.

In Chicago, B. & Q. R. Co. v. Gelvin, 238 F. 14, at page 23, the rule is stated:

> "It will be observed that the cause of action alleged in the first count of the petition is predicated upon the fright of the cattle by reason of the negligence of the defendant, and in this class of cases it has been held that if the wrong and resulting damage are not known by a common experience to be natural and usual in sequence, and the damage does not, according to the ordinary course of events follow from the wrong, then the wrong and the damages are not sufficiently conjoining and concatenated as cause and effect to support an action. Teis v. Smuggler Mining Co., 158 Fed. 260, 85 C. C. A. 478.
>
> "Things or results which are only possible cannot be spoken of as either probable or natural, for the latter are those things or events which are likely to happen, and which, for that reason, should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency and regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been de-

cleared. S. S. Pass. Ry. Co. v. Trich, 117 Pa. 290, 11 Atl. 627, 2 Am. St. Rep. 672."

In Shepard v. Denver Tramway Corporation, 62 F. (2d) 339, the rule is stated at page 340 as follows:

"But it is generally held, that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In Kresge Company v. Kenney, 86 F. (2d) 651, the rule is stated at page 652 as follows:

"The law holds responsible in damages one whose negligent act is the proximate cause of injury to another. 'The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.' Goodlander Mill Co. v. Standard Oil Co. (C. C. A.), 63 F. 400, 405, 27 L. R. A. 583. In the application of those principles to a situation where one injury alleged to have been caused by the negligence of another is succeeded by a further injury alleged to be the result of the first, the law regards negligence on the part of the injured person which contributes to the further injury as an efficient intervening cause. Hartnett v. Tripp, 231 Mass. 382, 121 N. E. 17; Watner v. Mittendord, 232 N. Y. 481, 134 N. E. 539; 20 A. L. R. 520; Hoseth v. Preston Mill Co., 49 Wash. 682, 96 P. 423."

In Duncan v. Montgomery Ward Co., 8th Circuit Court, 108 F. (2d) 848, the rule is stated at page 852 as follows:

"In order to warrant a finding that negligence is the proximate cause of the injury, it must appear that the injury was the actual and probable consequence of the negligence, and that it ought to have been foreseen in the light of the attending circumstances."

While this case was modified on appeal, 311 U. S. 243, 85 L. Ed. 147, the modification related to procedural questions and not to the principle above quoted.

In Jackson County v. Dufty, 8th Circuit, 147 F. (2d) 227, the rule is stated at page 233 as follows:

> "Liability for negligence depends upon proof that the injury suffered by plaintiff was caused by the alleged wrongful act or omission of defendant. Proximate cause is the primary moving cause which in natural sequence of events, and without intervention of any new or independent cause, produces injury. Joslin v. Linder, 26 S. D. 420, 128 N. W. 500; Houska v. Hrabe, 35 S. D. 269, 151 N. W. 1021, L. R. A. 1915D, 1074; Chicago Great Western R. Co. v. Mackie, 8th Cir., 60 F. (2d) 384."

We next come to a discussion of the chain of causation, which in many respects is intertwined with the question of proximate cause, as heretofore pointed out. The rule in Arkansas is clear that if subsequent to the original negligent act a new cause intervened, of itself sufficient to stand as the cause of the injury, the original negligence is too remote. See the following cases:

Pittsburg Reduction Co. v. Horton, 87 Ark. 576, 113 S. W. 647;

St. Louis Kennett & Southeast Red. Co. v. Fultz, 91 Ark. 260, 120 S. W. 984;

Hays v. Williams, 115 Ark. 406, 171 S. W. 882;

Bona v. Thomas Auto Co., 137 Ark. 217, 208 S. W. 306;

Southwestern Gas and Electric Co. v. Deshazo, 199 Ark. 1078, 138 S. W. (2d) 397;

Arkansas-Louisiana Gas. Co. v. Tuggle, 201 Ark. 416, 146 S. W. (2d) 154;

Arkansas Valley Trust Co. v. McIlroy, 97 Ark. 160, 133 S. W. 816.

The rule in federal jurisdictions is the same as that in Arkansas. We call the court's attention to a number of cases on this feature. In Horton v. Pennsylvania Railroad Co., 7 F. (2d) 36, the rule is stated at page 37 as follows:

> "The general rule is that if a new and independent force, acting in and of itself, intervenes, causing an injury, it will be regarded as the proximate cause. Insurance Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65; Goodlander Mill Co. v. Standard Oil Co., 63 F. 400, 11 C. C. A. 253, 27 L. R. A. 583; and authorities cited."

See, also, The Margaret L. Meseck, 23 F. (2d) 880, quoting the same rule from the Horton case. It should be noted, too, that the latter case is in admiralty.

In Chicago Great Western R. Co. v. Mackie, 8th Circuit, 60 F. (2d) 384, the rule is stated at page 385 as follows:

> "Davis v. Wolfe, 263 U. S. 239, 44 S. Ct. 64, 66, 68 L. Ed. 284, and Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455, 41 S. Ct. 381, 65 L. Ed. 729, stress the point that there must be a causal relation between the fact of delinquency and the fact of injury, and that it is not sufficient if the negligence complained of 'merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury.'
>
> "In City of Winona v. Botzet, 169 F. 321, page 328, 23 L. R. A. (N. S.) 204, this court, speaking by the late Judge Walter H. Sanborn, said: 'The proximate cause of an injury is the primary moving cause without which it would not have been inflicted, but which, in the natural and probable sequence of events, and without the intervention of any new or independent cause, produces the injury. The intervening cause that will insulate the original wrongful act or omission from the injury and relieve of liability for it must be an independent, intervening cause which interrupts the natural sequence of events, prevents the ordinary and probable result of the original act or omission, and produces a different result which could not have been reasonably anticipated.' "

In Johnson v. Kosmos Portland Cement Co., 6th Circuit, 64 F. (2d) 193, the rule is stated at page 195 as follows:

> "While the proximate cause of an injury is said ordinarily to be a question for the jury, Milwaukee, etc., Railway v. Kellogg, 94 U. S. 469, 474, 24 L. Ed. 256, this must be upon the assumption that the jury will apply the applicable law of proximate cause given it by the court, the correctness of which, upon exceptions reserved, can be examined and tested upon review. • • •
>
> "In respect to proximate cause, the United States Supreme Court, in Milwaukee, etc., Railway v. Kellogg, supra, page 475 of 94 U. S., said: 'The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' And again: 'But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating which produced the injury.'"

In Anderson v. Baltimore & O. R. Co., 2nd Circuit, 89 F. (2d) 629, the rule is stated at page 630 as follows:

> "An employee cannot recover for a violation of the statutory duty to provide safety appliances, such as the Boiler Inspection Act requires, unless the failure

to comply with the statute is the proximate cause of the accident which results in his injury; if it merely creates a condition or situation in which the accident happens from other causes, there is no liability."

It is significant that this suit was brought under the Federal Employers' Liability Act, alleging violation of the Boiler Inspection Act and Rule 120 of the Interstate Commerce Commission. Certiorari was denied in 302 U. S. 696, 82 L. Ed. 538. While it is true this case reversed the trial court, the facts warranted the finding that the negligence of railway was the proximate cause.

In Brennon v. Baltimore & O. R. Co., 2nd Circuit, 115 F. (2d) 555, the court held that the defendant's motion for directed verdict should have been granted because there was a failure of substantial evidence of negligence. This case was brought under the Employers' Liability Act.

The recent case of Willis v. Pennsylvania Railroad Co., 2nd Circuit, 122 F. (2d) 248, affirmed the trial court's order setting aside the verdict for plaintiff and directed a verdict for defendant. In this case the deceased was struck and killed by a moving freight car while he and two others were repairing a switch. It was the custom for switching to be continued while such track repair work was being performed and the repair gang had one of their number act as lookout. The deceased was the lookout. No warning was given the deceased of the approach of the car which hit him. The action was predicated upon the theory that the switching of cars under this condition was a dangerous practice. The court held that there was no actionable negligence proven and that the deceased's carelessness was the sole cause of his injury and that notwithstanding the 1939 Amendment to the Employers' Liability Act his executrix was not entitled to recover.

In Deere v. Southern Pacific Co., 9th Circuit, 123 F. (2d) 438, the court affirmed the action of the trial court in directing a verdict for the defendant. There the deceased was injured when a train collided with an inspection car which he was attempting to remove from the track. His administratrix sought to recover on the theory that Railway was negligent in failing to furnish sufficient help. The court held that to permit a recovery it must be shown that such failure was the proximate cause of the accident. While the court recognized that failure to furnish sufficient help was a ground of negligence recognized under the Employers' Liability Act, this was not the proximate cause of intestate's injury, but his injury was due to his own negligence and intervening cause.

A state court decision in point is Stone v. Boston Albany Railroad, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794. In this case a teamster, in lighting his pipe, threw down the burning match. The place where he threw it was saturated with oil which had leaked from barrels and rubbish which had been permitted to accumulate for some time in violation of a Massachusetts statute. Under these circumstances the court held that the negligence of the teamster in throwing the burning match in the oil was the proximate cause, and not the negligence of railway.

From the cases above cited it should be clear to the court that even though we concede, for purpose of argument only, that there may have been some negligence on the part of railway, that Wolfe's injuries were not the proximate result of such negligence. His injuries were due to his own carelessness in saturating himself with gasoline and thereafter striking the match.

We contend, further, that it is beyond the realm of reasonable anticipation for the defendant to have foreseen such an injury. If this be true, then there was no negligence on the part of the defendant.

CONCLUSION.

It is respectfully submitted that this case does not call for exercise by this court of its supervisory power and the Petition for Writ of Certiorari should be denied.

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